A

SYARIKAT YONG THAI v. ZUNG ZANG PLANTATIONS SDN BHD; ZUNG ZANG HOLDINGS SDN BHD (APPLICANT) & ANOTHER APPLICATION

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEONARD DAVID SHIM J
B [POST WINDING-UP NOS: SDK-28PW-6-7-2021
& SDK-28PW-7-7-2021]
21 FEBRUARY 2023

C **Abstract** – *In both solvent and insolvent liquidations, a liquidator has a duty to act impartially in carrying out the liquidation. Pending realisation and distribution of the assets, the liquidator must do all in his power to protect and preserve the assets of the company and not jeopardise them. Hence, where the liquidator fails to meet the statutory*
D *responsibilities, a contributory may seek an order to examine the liquidator pursuant to s. 277 of the Companies Act 2016, provided that leave of court is first sought.*

E ***COMPANY LAW:*** *Liquidators – Misfeasance – Allegation of – Application for liquidators to be examined on oath – Whether leave of winding up court required – Whether failure to obtain leave fatal to misfeasance application – Whether s. 277(3) of Companies Act 1965 could be relied on to order liquidator to make good losses sustained – Whether order could only be made based on report by Registrar of Companies or official receiver – Whether there was misfeasance or wrongdoing or irregularities in handling of liquidation process – Whether misfeasance*
F *application allowed*

The two applications herein were filed by the applicant to cross-examine the liquidator for alleged misfeasance or wrongdoing in the discharge of his duty as the liquidator of Zung Zang Plantation Sdn Bhd and Granright Enterprise Sdn Bhd ('misfeasance applications'). The application for leave was made
G pursuant to s. 277 of the Companies Act 1965 ('CA') and r. 51 of the Companies (Winding-up) Rules 1972 and/or the inherent jurisdiction of the court for Mr Lim and Mr Saw may be examined on oath by the court in relation to their administration of the assets of Zung Zang Plantations Sdn Bhd ('respondent company') in their respective capacities as the liquidator
H and agent of the respondent company. The allegations centred on impropriety or want of probity on the part of Mr Lim and Mr Saw in managing the oil palm plantation business of the respondent company. By the said application, the applicant also prayed for an order that, in the event the examination disclosed any misfeasance, neglect or omission on the part of
I Mr Lim and/or Mr Saw, they should make good any loss which the estate of the company had thereby sustained.

Held (dismissing misfeasance applications with no order as to costs):

(1) Leave of the winding up court is required before the contributory could seek the relief in the misfeasance application pursuant to s. 277 of the CA. There was no leave obtained by the applicant in the misfeasance application. Neither did the applicant proceed against the liquidator through the official receiver. The contributory's contention that the misfeasance application was in the nature of a leave application was misconceived. The contributory's failure to seek or obtain leave of the winding up court was fatal to the misfeasance applications. (paras 42, 48, 49 & 52)

(2) The contributory was also not entitled to rely on s. 277(3) of the CA to apply for an order against the liquidator to make good any loss which the estate of the respondent had allegedly sustained. Any order pursuant to s. 277(3) may only be made based on a report by the Registrar of Companies or the official receiver. There was no such report by the Registrar of Companies or the official receiver. (para 53)

(3) There were also police reports lodged by the applicant/contributory on the alleged misfeasance or wrongdoing. As the police investigations were ongoing and/or not concluded, it would be practicable to wait until the conclusion or outcome of the police investigation into the complaints of the alleged misfeasance or wrongdoing before the court decides on the merits of the said complaints. This was to avoid possible duplication and any issue or concern that the misfeasance applications would interfere with the ongoing police investigations. (para 54)

(4) It is the duty of a liquidator to protect the interest of the creditors and contributories of the company in liquidation. Section 487(3) of the Companies Act 2016 provides that a liquidator may apply to the court for directions in relation to any particular matter arising under the winding up. Thus, the joint liquidator, who was nominated by the applicant/contributory, should take appropriate action to investigate or verify the complaints made by the applicant/contributory and submit his findings to the winding up court before the winding up court decides whether or not to grant leave to make the misfeasance application. However, there was no issue raised or highlighted, by the joint liquidator, of misfeasance or wrongdoing or irregularities in the handling of the liquidation process by or involving Mr Lim and Mr Saw at any period of time in the joint liquidator's quarterly reports submitted to the winding up court. (paras 55 & 57)

Case(s) referred to:
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***
Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor [2003] 3 CLJ 739 HC ***(foll)***
Kao Che Jen v. N Chanthiran Nagappan [2015] 9 CLJ 295 CA ***(dist)***
TR Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd [2011] 1 LNS 1221 HC ***(refd)***
Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal [2010] 2 CLJ 858 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 226(3), 232(1), 266, 277(1), (2), (3), (4),
Companies Act 2016, ss. 483, 486, 487(3), 510(1), (2), (3), 522(1), (2)
Companies (Winding-up) Rules 1972, r. 51

For the major contributory - Norbert Yapp; M/s Norbert Yapp & Assocs
For the joint liquidators of the Company - Ryan Soo & Chin Yean Yean; M/s RYCO Law Firm

Reported by S Barathi

JUDGMENT

Leonard David Shim J:

Introduction

[1] There are two applications (encl. 1) filed by the applicant (Zung Zang Holdings Sdn Bhd) before this court to cross-examine the liquidator, Mr Lim San Peen for alleged misfeasance or wrongdoing in the discharge of his duty as liquidator of Zung Zang Plantation Sdn Bhd and Granright Enterprise Sdn Bhd (the misfeasance applications). Both misfeasance applications are inter-related as it involves common facts and issues pertaining to the handling of the management and liquidation of Zung Zang Plantation owned by the two companies. The misfeasance applications are also related to two separate applications for release and substitution of liquidator involving the same facts, issues, companies and oil palm estate. Thus, both parties agreed that the two misfeasance applications and the two release applications be heard together to save time and costs.

[2] The applicant's application for leave is made pursuant to s. 277 of the Companies Act 1965 ("Act") and r. 51 of the Companies (Winding-up) Rules 1972 and/or the inherent jurisdiction of the court for Mr Lim San Peen ("Mr Lim") and Mr Victor Saw Seng Kee ("Mr Saw") both of PricewaterhouseCoopers Advisory Services Sdn Bhd may be examined on oath by the court in relation to their administration of the assets of Zung Zang Plantations Sdn Bhd ("respondent company") in their respective capacities as the liquidator and agent of the respondent company. The allegations in the present case centred on impropriety or want of probity on the part of Mr Lim and Mr Saw in managing the oil palm plantation business of the respondent company.

[3] By the said application, the applicant is also praying for an order that in the event the examination discloses any misfeasance, neglect or omission on the part of Mr Lim and/or Mr Saw, then they shall make good any loss which the estate of the company has sustained thereby. The applicant contends that it was compelled to make the present application as it has managed to obtain new and damaging information regarding the operations inside the plantation which materially affected the interests of the applicant as the major contributory of the respondent company. This new information only came to light after the disposal of the applicant's earlier application to remove Mr Lim as the sole liquidator.

[4] The grounds of this application are contained in the affidavit in support of Kwan Hiuang @ Kwan Huang Cheng affirmed on 5 July 2021 (encl. 2) filed herein.

[5] The application is being opposed by both Mr Lim and Mr Saw. However, the latter did not file any affidavit to respond to the allegations made against him in the applicant's affidavit in support. In the affidavit in opposition dated 3 August 2021, Mr Lim has raised the following preliminary objection ("PO"):

(i) by encl. 1, the applicant makes allegations of misfeasance, neglect or omission against him and Mr Saw. The applicant is seeking an order against them to make good any loss which the estate of the respondent company has sustained in the event the proposed examination discloses any misfeasance, neglect or omission on their part.

(ii) the applicant does not have the right to seek the orders in encl. 1.

(iii) also, in view of the basis and nature of the application in encl. 1, leave of the winding up court is required before the applicant could seek the orders in encl. 1. The applicant has not sought or obtained such leave.

(iv) further, the applicant in law is not entitled to seek such orders against Mr Saw.

[6] It is pertinent to note that at the time when this application was filed by the applicant on 5 July 2021, Mr Lim had made an application under Post Winding up No. SDK-28PW-5-5-2021(HC) on 17 May 2021 to be released as the private liquidator of the respondent company and for a consequential order for Mr Saw to be appointed as the joint liquidator as his replacement, together with Mr Chau Man Kit. The applicant has opposed the said application and the release and substitution applications are being heard together with the present application by this court.

[7] Section 277 of the Companies Act 1965 provides as follows:

A Books to be kept by liquidator

(1) Every liquidator shall keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect them.

B Control of Court over liquidators

(2) The Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the C Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

(3) The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make D good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.

(4) The Court may at any time require any liquidator to answer any inquiry in relation to the winding up and may examine him or any other person on oath concerning the winding up and may direct an investigation to be made of the books and vouchers of the liquidator.

E

Delivery of property to liquidator

(5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such F time as the Court directs any money, property, books and papers in his hands to which the company is *prima facie* entitled.

And r. 51 of the Companies (Winding-up) Rules 1972 provides as follows:

An application for an order for the examination of the liquidator or other persons under section 277 may be made *ex parte* by the Official Receiver, G the Registrar of Companies or any creditor or contributory and shall be supported by affidavit.

[8] It may be noted that s. 277(2), (3) and (4) of the Act are similar in content to s. 510(1), (2) and (3) of the 2016 Companies Act.

H **[9]** It is trite in both solvent and insolvent liquidations, a liquidator has a duty to act impartially in carrying out the liquidation. Pending realisation and distribution of the assets, the liquidator must do all in his power to protect and preserve the assets of the company and not jeopardise them. The applicant contends that in the present case, Mr Lim and Mr Saw have failed to meet these statutory duties and responsibilities.

I

Contention Of The Parties

The Preliminary Objection (PO)

[10] It is submitted by the applicant that there is no substance to the preliminary objection (PO). Contrary to what was contended by Mr Lim in para. 5 of the AIO, the statutory provisions under s. 277 of the Companies Act 1965 and r. 51 of the Companies (Winding-up) Rules 1972 are wide enough to enable the applicant as a contributory to seek the orders sought in the notice of motion without having to file a separate leave application. It is submitted by the applicant that there is no need to file a separate leave application with the winding up court to bring the proceedings under s. 277 of the Companies Act and r. 51 of the Companies (Winding-up) Rules as the notice of motion filed herein is in the nature of a leave application. Section 277 is a procedural provision.

[11] The applicant will rely on the decision of the Court of Appeal in *Kao Che Jen v. N Chanthiran Nagappan* [2015] 9 CLJ 295 to support its contention. In that case, the court held (in the context of s. 232(1) of the Act) that the removal of the respondent as the company's liquidator and the appointment of the official receiver in his stead is governed by ss. 232(1) and 266 of the Act which did not make leave as a prerequisite to such removal application. The appellate court held that in imposing the requirement of leave under s. 232(1) of the Act, the learned High Court Judge (HCJ) had misconstrued the section. This would be against the clearly expressed intention of Parliament which could be said to tantamount to adding what was not in the Act of Parliament. The court further held that the HCJ should have construed what s. 232(1) of the Act says, not what the section ought to have said. The HCJ's decision would have an effect of imposing an additional burden to protect the liquidator under all circumstances, without any exception and for any misconduct including criminal and illegal acts that the liquidator may have committed. By requiring leave before an action to remove the liquidator can be initiated caused grave injustice to the appellant. The HCJ had clearly misdirected herself in misapprehending the law in allowing the application to strike out the appellant's originating summons.

[12] It is submitted by the applicant that this is consistent with the earlier holding of the Court of Appeal in *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11. In the said case, the appellant who sued the liquidator was neither a creditor nor a contributory of the wound up company. The appellant was the landlord of the premises rented to the said company. Rental was owed to the appellant. The appellant sued the liquidator for it without obtaining leave from the winding up court. On the issue of obtaining leave before suing the liquidator, the High Court found that s. 226(3) of the Act was not complied with and dismissed the originating summons. The Court of Appeal affirmed the decision but for different reasons. This is what the court said at p. 17 para f to g:

> … While we agree that the applicant may proceed against the liquidator, we are however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding-up Judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned Judge should take is as given in the Privy Council case of *Lyod-Owen v. Bull* cited above. A(s) advised in that case, he has to obtain authority from a Judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning Judge that this action is not vexatious or merely oppressive.

[13] In the case of *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal* [2010] 2 CLJ 858, the trial judge made an *ex parte* order granting leave for issue of order of committal against the liquidator and the wound up company. It was held by the Court of Appeal that leave from the winding up court was required when the proposed action against a liquidator was pursued in another court as he is an officer of the court. However, the Court of Appeal did not state what the appropriate provision of the Act under which the application should be made. The relevant passages of the Court of Appeal are as follows:

> [18] We would agree with the submission of learned counsel for the liquidator. Upon perusing the authorities referred to earlier, we are of the unanimous view that prior leave from the court is required before the appellant can make any application for leave under O. 52 r. 2 of the Rules as against the liquidator, he being an officer of the court. It is clear that the appellant was not armed with such leave when he made the application against the liquidator.
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> [19] As discussed earlier, learned counsel for the appellant in referring to *In re Maidstone Palace of Varieties Limited*, argued that leave of the winding up court is required only when the proposed action against a liquidator is pursued in another court other than the winding up court. We do not agree with counsel's proposition. Whether the purported action against the liquidator is in another court or the winding up court is irrelevant.

[14] It is further submitted by the applicant that it is clear from the wordings of sub-s. (2) of s. 277 of the Act that the court can take cognisance of any complaint made by any contributory in regard to the conduct of the liquidator and persons under his control and supervision. The powers of the court under s. 277 also include directing an investigation to be made of the books and vouchers of the liquidator. Further, it is submitted by the applicant that the threshold to be satisfied for a leave application under s. 277(2) is not high. The applicant only needs to show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds in support of the application. In *Chi Liung Holdings* (*supra*), the test was stated to be "probable success" and "not vexatious or merely oppressive".

[15] In the event that leave is granted to examine Mr Lim and Mr Saw, s. 522(1) of the 2016 Act provides that the Session Court Judge shall be the commissioner for the purpose of taking evidence, and the High Court may refer the whole or any part of the examination to any person appointed as commissioner. The powers of the commissioner are further set out in s. 522(2) of the 2016 Act. The said Act further provides that the examination so taken shall be returned or reported to the court in such manner as the court directs.

[16] Further or alternatively, it is submitted by the applicant that the application made under s. 277 of the Companies Act and r. 51 of the Companies (Winding-up) Rules does not amount to bringing an action against the liquidator. It is to examine the liquidator and persons involved in the administration of the company's affairs. Hence, the appellant contends that the question of obtaining leave from the winding up court does not arise.

[17] With regard to the assertion that the applicant is not entitled to seek such orders against Mr Saw, it is submitted by the applicant that Mr Saw will fall under the category of "other persons" referred to in s. 277(4) of the Act.

[18] Mr Lim cannot possibly deny that Mr Saw is his "authorised deputy". In this regard, the applicant will refer to the affidavit affirmed by Mr Lim on 12 May 2021 in Post Winding Up No. SDK-28PW-4-5-2021(HC) wherein it was averred that Mr Saw has been assisting him in the liquidation of the respondent company and that he is well versed with the affairs of the company. The said affidavit was filed in conjunction with Mr Lim's application to be released as the liquidator and his proposal to nominate Mr Saw as his replacement thereof. The said affidavit is exhibited in the applicant's afidavit in reply (encl. 8) and marked as "KH23".

[19] In the premises, the applicant submitted that the applicant has satisfied the requirements under s. 277 of the Act and r. 51 of the Winding-up Rules and the applicant prays that the PO be dismissed.

[20] The applicant is a majority contributory of Zung Zang Plantations Sdn Bhd (In Liquidation) ("the respondent company") holding 400,000 out of the 500,000 issued shares of the respondent company. The 400,000 shares held by the applicant is equivalent to 80% of the total shareholding of the respondent company. Being a major contributory, the applicant's rights and pecuniary interests will be directly affected by any misfeasance or malfeasance committed by the liquidator and his agent, especially when it is an undisputable fact that the total value of the assets of the respondent company far exceeds its liabilities.

[21] The applicant states that as a contributory it is a person with sufficient or legitimate interest to bring this application as they are persons who are "entitled to participate in the ultimate distribution of the company's assets",

especially when the evidence shows that this is a solvent liquidation. Crucially, the value of the oil palm plantations owned by the respondent far exceeded the admitted proof of debt.

[22] It is an undisputed fact that the respondent company owns approximately 1,152.88 hectares (2,848.83 acres) of land situated in the District of Kinabatangan, Sandakan, Sabah comprising 59 individual titles, which have been planted with oil palm and have been producing fresh fruit bunches (FFB). The plantation comprised the main assets of the respondent company. Out of the 59 titles, 20 of them have been charged to Public Bank Berhad, and another 20 titles have been charged to CIMB Bank Berhad. The total acreage of the land which has been charged to the said banks is 2,369.62 acres. The portion which is unencumbered is 479.13 acres. This plantation is contiguous with another plantation measuring 964.72 acres owned by Granright Enterprise Sdn Bhd which has also been wound up on the petition presented by Syarikat Yong Thai. The applicant had exhibited a sketch plan in the affidavit in support marked "KH5" showing the two contiguous plantations.

[23] Although the court has empowered him to carry on the business of the respondent company, apparently, the first thing Mr Lim tried to do after his appointment was to get a valuation report of the plantation from a private valuer (Knight Frank Malaysia Sdn Bhd) with a view to putting up the two plantations for sale. This is despite the fact that the plantations are subject to existing registered charges. The first report prepared by the said valuer is dated 30 October 2017. Based on the information extracted from the liquidator's accounts as of 23 November 2017, Mr Lim had caused the respondent company to spend RM35,400 for the valuer's fees. These fees do not include the subsequent updated valuations carried out by the said valuer. It seems the said valuer was instructed to prepare an updated valuation in November 2018. Based on this updated valuation, the plantation belonging to the respondent company has a market value of RM45,750,000. A copy of the updated valuation report dated 19 November 2018 which was exhibited by Mr Lim in another proceedings has been exhibited in the affidavit in support marked as "KH6".

[24] In January 2019, Mr Lim had attempted to put up the two plantations for auction sale at the combined reserve price of RM68,000,000. In the bidding document, the reserve price of the plantation belonging to the respondent company was stated as RM50,797,866.90. Apparently, Mr Lim did not obtain the prior consent of the registered chargees before he put up the plantation lands for sale by public auction.

[25] The applicant has come to know through documents exhibited by Mr Lim in another court proceedings that there is a drastic drop in the value of the plantation. It has fallen to RM35,900,000 in August 2020 as a result of the unprecedented decision taken by Mr Lim to abandon the operations

of the oil palm plantation after the High Court have granted the applicant's application to appoint Mr Chau Man Kit as a liquidator of the respondent company on 17 June 2020. Mr Lim claimed in para. 15.1 of his AIO that the plantation manager resigned on 23 July 2020. This averment requires further examination because the information obtained by the applicant shows otherwise. During this period, Kwan Hung Cheong was busy harvesting and selling the FFB belonging to the respondent company. The new plantation was only appointed in June 2021, after a lapse of one year. The applicant verily believe that Mr Lim had breached the order dated 24 January 2018 when he caused the plantation to cease operations abruptly in June 2020 without seeking directions from the court.

[26] The reduced valuation figure of RM35,900,000 is based on the updated valuation report dated 28 August 2020 prepared by Knight Frank Malaysia Sdn Bhd. Pertinently, in the said report, the valuer has made several revealing and damaging statements which implicates the conduct and performance of Mr Lim, such as: "Based on information provided to us by the client, the Estate restarted operations in June 2018 and subsequently ceased operations again in June 2020. During the times in which operations were ceased, maintenance such as clearing, manuring and collection of FFB were not conducted and the number of workers reduced. This has resulted in some problems as specified under "Field Condition" within this update valuation."

[27] The updated valuation report further went on to state: "We have noted that the amount of FFB harvested has been generally low since the start of 2019, reversing the trend seen in our previous valuation report in 2018. Based on information provided by the Estate Manager, this reduction in harvested FFB is mainly due to a persistent shortage in fertilizer which has significantly reduced the amount and quality of FFB, and the shortage in available workers."

[28] It is submitted by the applicant that as a professional accountant, Mr Lim is well aware that any cessation of the respondent company's operations or business will result in heavy financial losses to the creditors and the contributories. It will also affect the market value of the plantation and its yield. It is clear that Mr Lim has failed to discharge his duties and responsibilities professionally, faithfully and diligently. As an officer of the court, Mr Lim and Mr Saw are personally liable for their negligence and misconduct in administering or managing the affairs and assets of the respondent company.

[29] Further, it appears that Mr Lim is only interested to sell off the plantation. This is evident from his averments in para. 13 of the AIO. In fact, on 30 September 2022, the learned High Court Judge (YA Tuan Wong Siong Tung) has dismissed the joint liquidators' application to sell the plantation lands under Originating Summons No. SDK-24NCvC-22-9-2020.

[30] Apart from the wrongdoings mentioned above, the applicant has also discovered that Mr Lim has allowed Mr Kwan Hung Cheong ("Kwan") and Madam Elaine Gay Chow Song ("Elaine") who are the minority contributory of the respondent company to continue to manage, sell and misappropriate the FFB belonging to the respondent company. Prior to the winding up order made against the respondent company, Kwan and Elaine had set up a FFB collection centre under their company, Seattle Realty Sdn Bhd inside the plantation. This company has been used by Kwan and Elaine to siphon the FFB belonging to the respondent company. This effectively allows them to take control over the operations inside the respondent company's plantation and for them to sell the FFB belonging to the respondent company. This probably explains why there was no income recorded in the liquidator's reports dated 23 November 2017 and 23 May 2018. Mr Lim has shut his eyes to all the wrongdoings happening inside the plantation for reasons best known to him and his agents. The bare denial by Mr Lim cannot be accepted because the applicant had exhibited documents from Malaysian Palm Oil Board ("MPOB") showing FFB sold by them during the period when Mr Lim was the sole liquidator.

[31] As a matter of fact, based on the inquiries made by the applicant with MPOB, Seattle Realty Sdn Bhd first applied for the licence in November 2013 using the land owned by the respondent company held under CL 095331187 measuring approximately 19.12 hectares to operate the collection centre. The licence has been renewed up to 31 October 2020. This must be done with the full knowledge of Mr Lim and Mr Saw unless they have not bothered to visit the plantation all this while and are content to operate remotely from their plush offices in Kuala Lumpur. It is also apparent that Seattle Realty Sdn Bhd has misled MPOB to obtain the licences for the period from 20 November 2013 to 31 October 2020 by using the plantation's land for the location of the collection centre. The MPOB licences issued to Seattle Realty Sdn Bhd are exhibited in the applicant's affidavit in support as "KH17(b)".

[32] Further, the applicant has been informed by MPOB that the said licence has been revoked after an inquiry was conducted upon the complaint made by the applicant. The applicant had to act because Mr Lim refused to do anything about the licence. Even if the collection centre was set up by Seattle Realty Sdn Bhd before the respondent company was wound up, it does not mean Mr Lim is under no duty or obligation to examine the validity of the previous dealings since the presence of the collection centre is highly questionable. Further, the low income reported by his purported plantation manager, CN Agro Management Services should have alerted Mr Lim that something is not quite right inside the plantation.

[33] The applicant contends that Mr Lim cannot possibly deny that in respect of the period from 24 May 2018 to 23 November 2018, the income reported by him was only RM29,880.59. This averages to an income of RM4,980 per month! For the period from 24 November 2018 to 23 May 2019, the income reported was further reduced to RM22,410.48. For the period from 24 May 2019 to 23 November 2019, the income reported was RM359,583.48. For the period from 24 November 2019 to 23 May 2020 the income reported was RM432,565.41. The unusually low income during the management of the plantation under Mr Lim has affected the ability of the respondent company to service the loans owed to the secured creditors, prompting them to commence foreclosure proceedings against the charged properties. This is highly prejudicial to the interest of the applicant.

[34] It is submitted by the applicant that this unusually low incomes from the sale of the FFB disclosed in the liquidator's report warrants the invocation of s. 277 of the Act against Mr Lim and Mr Saw. The liquidator's reports extracted from SSM are exhibited in the applicant's affidavit in support as follows:

(i) liquidator's report dated 23 November 2017 marked "KH11";

(ii) liquidator's report dated 23 May 2018 marked "KH12";

(iii) liquidator's report dated 23 November 2018 marked "KH13";

(iv) liquidator's report dated 23 May 2019 marked "KH14";

(v) liquidator's report dated 23 November 2019 marked "KH15"; and

(vi) liquidator's report dated 23 May 2020 marked "KH16".

[35] Following the appointment of Mr Chau Man Kit by the High Court as the joint liquidator of the respondent company, the applicant sought permission to enter the plantation. Mr Chau wrote to Mr Lim on 6 July 2020 suggesting that they invite the applicant to lead them through during the planned site visit on 8 July 2020. This is because Mr Chau is not familiar with the plantation. However, Mr Lim replied to Mr Chau on 7 July 2020 saying that he does not recognise the applicant's status as the major contributory of the respondent company and therefore cannot consider Mr Chau's suggestion. Please refer to exhibits marked as "KH29(a)" and "KH29(b)" annexed to the applicant's affidavit in reply.

[36] In fact, the new plantation manager, Pemborong Sri Emas has written to the joint liquidators on 7 August 2021 complaining about the difficulties faced by them in managing the plantation due to the interference from Kwan. It is evident that Mr Lim is still condoning the presence of Kwan inside the plantation.

[37] With regard to the police report which the applicant had lodged earlier, the police have written to the applicant on 18 December 2020 stating that based on their initial investigation carried out by them on Syarikat Kim Loong Oil Palm, FFB weighing 2,994.07 tons with a value of RM1,211,495.75 have been received by them for the period from June 2018 to December 2018. A copy of the reply from the investigation officer marked as "KH32" is annexed to the applicant's affidavit in reply.

[38] It is submitted by the applicant that as a whole, Mr Lim has failed to credibly rebut the applicant's allegations relating to the unreasonably low quantities and income derived from the FFB. The AIO only contains bare denials. Mr Lim has even questioned the data given by MPOB. Mr Lim's feign ignorance of the presence of Ming Zang Estates and Seattle Realty Sdn Bhd operating inside the plantation calls for further examination by the court. If he says he does not know of their presence all this while, then he may be guilty of negligence and ought to be penalised.

[39] The applicant would further submit that the application would advance the purposes for which Mr Lim was appointed as a liquidator of the respondent company.

[40] The applicant states that it has satisfied the criteria for the order under s. 277(2) to be issued against Mr Lim and Mr Saw.

Liquidator's Submission

[41] At the outset, the liquidator (Mr Lim San Peen) submits the misfeasance application is defective for two reasons, either of which will render it liable to be dismissed *in limine*.

[42] Firstly, the contributory made the misfeasance application without the requisite leave of court:

(i) it is settled law that leave of the winding up court is required before the contributory could seek the relief in the misfeasance application pursuant to s. 277, CA 1965. This was held in *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor*, HC:

> Skelchy, whilst denying all of Abdul Rahman's allegations, sought to have the application dismissed on the sole ground that Abdul Rahman failed to obtain leave of court before proceeding against him under s. 277(2) of the Act and cited the case of *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 3 MLJ 204 (CA) as authority.
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> On this question, I am completely *ad idem* with Abu Mansor JCA, who delivered the judgment of the Court of Appeal. He held that:
>
> > … it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him …

> Thus, it is clear that in the instant cast (*sic*), Abdul Rahman, being a contributory, has only two avenues open to him to move against the company, namely either by invoking s. 277(2) or s. 229 read in conjunction with s. 232(1). It is now settled that the court's leave is required to proceed under s. 277(1). Unfortunately, Abdul Rahman has neither secured the necessary leave from the court nor sought to proceed against the liquidator through the OR. This is fatal to his cause in encl. 43.

(ii) it is undisputed that leave of winding up court has not been obtained. Therefore, the misfeasance application ought to be dismissed on this ground alone – s. 232(1) CA 1965; *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor*.

[43] Secondly, the contributory is not entitled to seek an order against liquidator and/or the liquidator's agent, to make good any loss which the estate of the respondent allegedly sustained:

(i) pursuant to s. 277(3) of CA 1965, the court may only order the liquidator to make good any loss which the estate of the company has sustained upon receipt of a report from the Registrar or the official receiver of any misfeasance, neglect or omission on the part of the liquidator. The contributory has not said or shown that there is such report – Section 277(3), CA 1965; *Fermoyle Pty Ltd, Re Commonwealth v. Brown*, SC (Aus).

(ii) the contributory is also not entitled to such order against the liquidator's agent. On a plain reading of s. 277(3) of CA 1965, this section only applies to the liquidator of a company. It does not apply to the liquidator's agent.

(iii) for the reasons set out above, the liquidator submits the contributory is not entitled to seek the order in the misfeasance application against the liquidator and the liquidator's agent. Also, for the same reasons, this court is not empowered by s. 277 to grant the order in the misfeasance application. The Supreme Court in *Fermoyle Pty Ltd, Re Commonwealth v. Brown* held:

> Now, where does the court stand as to its powers having regard to the events I have described and to what extent and in what manner should any power possessed by it be exercised?
>
> It is clear that sub-s. (2) of s. 278 has no application. Neither the Commissioner nor the Board has reported to the court. The powers of the court conferred by sub-s (2) are, therefore, not exercisable here as they are predicated on such a report being made to the court. The inquiry and investigation referred to in sub-s (3) has been completed.
>
> That subsection is, therefore, no longer the source of any power. Accordingly, the court is limited to whatever powers are to be found in sub-s. (1).

[44] In the circumstances, the liquidator submits that misfeasance application ought to be dismissed *in limine*.

[45] Apart from the fatal defects noted above, the liquidator submits the contributory's allegations in the misfeasance application are devoid of merit.

[46] The liquidator respectfully submits the contributory filed the misfeasance application with improper motive or purpose:

(i) as noted above, the co-liquidator was appointed on 17 June 2020 on the contributory's nomination. Even though the co-liquidator has full access to the respondent's books and records and spent over two years in office, there is no finding by the co-liquidator that there is any improprieties or wrongdoings on the part of the liquidator or the liquidator's agent during the first period or second period.

(ii) also, although the contributory contends there are improprieties or wrongdoings in the second period, they inexplicably made these allegations only against the liquidator and the liquidator's agent even though the liquidation was conducted jointly with co-liquidator.

(iii) further, in the quarterly reports which are co-signed by co-liquidator summarising the affairs of the respondent, there is no finding of improprieties or wrongdoings on the part of the liquidator or the liquidator's agent whether in respect of the first period or second period. If there is any impropriety or wrongdoing, one would reasonably expect the co-liquidator to raise this with the winding up court.

(iv) more significantly, the contributory's allegations against the liquidator and the liquidator's agent have been denied in an affidavit filed on behalf of the liquidator and co-liquidator in the sale application.

[47] All the above matters go to show that the contributory's allegations against the liquidator and the liquidator's agent are unfounded and are raised with improper motive or purpose. With respect, the liquidator submits the misfeasance application is yet another attempt by the contributory to interfere with the winding up process after unsuccessfully removing him earlier.

Evaluation And Findings

[48] It is undisputed that no leave of the winding up court was obtained by the applicant to make the misfeasance application. Neither did the applicant proceed against the liquidator through the official receiver. The court in *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739; [2003] 6 MLJ 448, held an application under s. 277 CA 1965 would require leave of court. The High Court held as follows:

(1) Abdul Rahman, being a contributory, had only two avenues open to him. However he had not secured the necessary leave of the court to proceed against the liquidator under s. 277(2) of the Companies Act 1965 ('the Act') (see p. 458G-H); *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 3 MLJ 204 (folld) followed. Alternatively, Abdul Rahman could proceed against the liquidator, through the Official Receiver ('OR'), under s. 229 read in conjunction with s. 232(1). The OR was entrusted with the duty of inquiring into complaints regarding a liquidator's performance. The OR could conduct an inquiry or direct an investigation of the liquidator. It was only after such an inquiry or investigation and, where the OR thought fit, that the OR would apply to the court to examine the said liquidator to take cognizance of his conduct. A court should not embark on an inquiry of its officer unless there is substantial material before the court to suggest that it would be in the public interest to do so. Thus, Abdul Rahman's failure to proceed against the liquidator, through the OR, was fatal.

[49] The contributory's contention that the misfeasance application is in the nature of a leave application is misconceived. The court is inclined to agree with the liquidator's submission that:

(i) the contributory's contention is not borne out of or supported by the orders sought in the misfeasance application. It is obvious from the orders sought in the misfeasance application that the contributory are not seeking leave.

(ii) the contributory's contention shows they are conceding leave is required before they could seek the orders in the misfeasance application.

[50] The cases cited by the applicant/contributory in the contributory's submission do not assist them and are distinguishable:

(i) the case of *Kao Che Jen v. N. Chanthiran Nagappan* relied on by the contributory is factually distinguishable as it concerned an application to remove a liquidator, and not an application pursuant to s. 277 CA 1965. It bears repeating that in the case of *Jerry Ngiam Swee Beng*, the court has expressly held that leave of court is required to proceed under s. 277(1) CA 1965.

(ii) as for the cases of *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* and *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Anorther Appeal* relied on by the contributory, they, if properly analysed, in fact support the liquidator's position. In both of cases, the Court of Appeal held that leave of the winding up court is required before proceedings can be initiated against the liquidator.

[51] It is also significant to note that in *Woodsville Sdn Bhd*, the Court of Appeal expressly rejected the contention that a separate leave application is not required before initiating proceedings against the liquidator, the Court of Appeal held:

A [19] As discussed earlier, learned counsel for the appellant in referring to *In re Maidstone Palace of Varieties Limited*, argued that leave of the winding up court is required only when the proposed action against a liquidator is pursued in another court other than the winding up court. We do not agree with counsel's proposition. Whether the purported action against the liquidator is in another court or the winding up court is irrelevant. In
B the instant case the appellant alleged that the liquidator has committed contempt of court by failing to conduct any investigation on the existence of the Tuallang lands as a result of which it is initiating committal proceedings against the liquidator in the course of the winding up of the first respondent. The liquidator has yet to be released or has yet to apply
C to court for an order that he be released and that the company be dissolved. Pending that, he is still an officer of the court and any proposed action against him by the petitioner as in this case for any alleged wrongdoing will still need the sanction of the winding up court. As such, we are of the view that the learned judge was correct in setting aside the said *ex parte* order obtained against the liquidator. On this ground alone,
D we would dismiss the appeal by the appellant with costs. We would also order that the deposit be remitted to the liquidator to account of taxed costs.

[52] Applying the principles in *Jerry Ngiam* above to the instant case, the court finds that the contributory's failure to seek or obtain leave of the
E winding up court is fatal to the misfeasance applications.

[53] Further, the contributory is also not entitled to rely on s. 277(3) CA 1965 to apply for an order against the liquidator to make good any loss which the estate of the respondent has allegedly sustained. Any order pursuant to s. 277(3) CA 1965 may only be made based on a report by the Registrar of
F Companies or the official receiver. There is no such report by the Registrar of Companies or the official receiver – s. 277(3) CA 2016; *Fermoyle Pty Ltd, Re Commonwealth v. Brown*, SC (Aus).

[54] In the event that this court has erred on the finding on that leave of the winding up court is required to be obtained, this court will consider the
G other reasons for allowing or disallowing the misfeasance applications. It is not disputed that police reports has been lodged by the applicant/ contributory on the alleged misfeasance or wrongdoing. As the police investigations are ongoing and/or not concluded, it would be practicable to wait until the conclusion or outcome of the police investigation into the
H complaints of alleged misfeasance or wrongdoing before the court decides on the merits of the said complaints. This is to avoid possible duplication and any issue or concern that the misfeasance applications would interfere with the ongoing police investigations.

[55] It is also not disputed that the joint liquidator, Mr Chau Man Kit was
I nominated by the applicant/contributory and he did not raise or highlight any issue of misfeasance or wrongdoing or irregularities in the handling of

the liquidation process by or involving Mr Lim and Mr Saw at any period of time in the joint liquidator's quarterly reports submitted to the winding up court.

[56] Mr Chau have access and/or possession of the documents relating to the winding up of the two companies. Mr Chau also have joint possession and access to Zung Zang oil palm estate to enable him to carry out his duties as joint liquidator including carrying out investigation of any irregularity or wrongdoing that may occur or may have occurred concerning the liquidation process. This is especially so when the alleged misfeasance or wrongdoing concerning the liquidation process and monies received or ought to have been received from the sale of FFB from Zung Zang estate was highlighted and made known by the contributory to Mr Chau during his appointment as joint liquidator. Therefore, he cannot close his eyes to the issues or complaints raised by the contributory and proceed on the assumption that it is not his duty to investigate the serious allegations made by the applicant/contributory. It is the duty of a liquidator to protect the interest of the creditors and contributories of the company in liquidation. See *TR Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd* [2011] 1 LNS 1221.

[57] The liquidator is under a duty to take possession and collect all assets or monies belonging to the company in liquidation and give a full account of all monies received and take appropriate action to recover any monies that are due and owing to the two companies. See s. 483 of the Companies Act 2016. The powers of the liquidator in a winding up by the court is very wide and includes the general power to do all such other things as are necessary for winding up the affairs of the company and distributing its assets. See s. 486 and Twelve Schedule of the Companies Act 2016. If the liquidator is unsure of the scope of his duties, it is incumbent upon him to apply to the winding up court which appointed him to seek further directions. Section 487(3) of the Companies Act 2016 provides that a liquidator may apply to the court for directions in relation to any particular matter arising under the winding up. Thus, the joint liquidator, Mr Chau should take appropriate action to investigate or verify the complaints made by the applicant/contributory and submit his findings to the winding up court before the winding up court decides whether or not to grant leave to make the misfeasance application.

Conclusion

[58] Based on the aforesaid reasons, the misfeasance applications (encl. 1) concerning the liquidation of Zung Zang Plantation Sdn Bhd and Granright Sdn Bhd are dismissed. As the liquidator and the contributory did not succeed in their respective release applications and the misfeasance applications, the court makes no order as to costs.